Supreme Court, U.S.
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No. 96-1246

In The

Supreme Court of the United States

October Term, 1996

PAUL EASTERDAY,

Petitioner,

v.

LARRY GILBERT, in his individual capacity, and as Sheriff of Okaloosa County, Florida,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Court, in its certiorari discretion, review *Easterday v. Gilbert*, No. 96-2648 (11th Cir. 1996), which per curiam affirmed the District Court's (Northern District of Florida) decision, *Easterday v. Gilbert*, Civil Action No. 93-30628/LAC (N.D. Fla. 1996).

   Stated differently, are there special and important reasons for the Court to exercise its certiorari jurisdiction to review an affirmance of a summary judgment of the District Court, which held that Petitioner's insubordinate on-duty remarks were not protected by the First Amendment, when the opinion does not directly conflict with opinions of this Court or other federal courts on the same issue?

2. Did the Eleventh Circuit, by affirming the summary judgment entered in favor of the Respondent, sanction a departure from the accepted and usual course of judicial proceedings to warrant the exercise of this Court's certiorari jurisdiction?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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BRIEF IN OPPOSITION

Respondent, Larry Gilbert, opposes issuance of a writ of certiorari to review the affirmance of the United States Court of Appeals for the Eleventh Circuit of the judgment of the United States District Court for Northern District of Florida in the above styled case.

OPINION AND JUDGMENT BELOW

Upon consideration of Respondent's motion for summary judgment and memorandum of law, in addition to the affidavits and depositions submitted by parties, the United States District Court for Northern District of Florida entered judgment as a matter of law in favor of Respondent. The District Court held that on-duty comments by Petitioner, a deputy sheriff, which challenged Respondent's qualifications to serve as Sheriff of Okaloosa County, Florida, were not protected by the First Amendment. Specifically, the court found that although Petitioner's remarks constituted a matter of public concern, Respondent's interest in maintaining the efficient operation of his office outweighed Petitioner's interest in making on-the-job comments which were critical of the Sheriff. The District Court's Order, Appendix A, may be found at 1a-10a.

On November 5, 1996, after the parties had submitted briefs,[1] the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's judgment for

[1] Neither party requested oral argument.

Sheriff Gilbert. *Easterday v. Gilbert*, No. 96-2648 (11th Cir. 1996). The unreported opinion, Appendix B, may be found at 11a-12a.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is deficient because it fails to adequately describe the close-knit, paramilitary nature of his work environment. Petitioner's description of the events which gave rise to his dismissal is also lacking because it does not set forth the complete dialogue of the Petitioner and his supervisor, as well as the deputies' reaction to Petitioner's improper remarks. Petitioner further misstates the context of the comments by representing that the speech was politically motivated. Rather, Petitioner's outburst against the Sheriff resulted from a culmination of work-related and personal problems which were completely unrelated to any political issue, such as reelection of the Sheriff.

The Petitioner, Paul Easterday, was hired as a deputy sheriff for the Okaloosa County Sheriff's Office in April, 1987. (R1-33-4). Easterday was assigned to the Crestview district in Okaloosa County. (R1-32-44). A total of 27 officers and employees worked in the Crestview district, which served the citizens of northern Okaloosa County. Due to the paramilitary nature of the Sheriff's Office, and the relatively small size of the district office, the deputies enjoyed close working relationships with each other. (R1-32-44-45).

In 1991, the Petitioner encountered a series of marital and financial problems. He and his wife separated, and

creditors levied on his property, foreclosed on his mortgage, and repossessed a vehicle. (R1-33-10-17). These personal difficulties were very stressful for the Petitioner, and continued to trouble him through December of 1991. (Plaintiff's Deposition, R1-33-23-25 and Exhibit "3" to deposition; R1-33-37).

On December 23, 1991, the Petitioner worked the midnight shift, 12:00 a.m.-8 a.m. Easterday reported to the Crestview district office at approximately 7:20 a.m. for shift change. He was on duty and in uniform at the time. (R1-33-17-19). Present in the deputies' room at this time were Sgt. Griffith, and deputies Tyson, Garrett, and Berry. (R1-33-17-19).

Easterday was under considerable stress at the time of shift change. He was finishing a particularly trying evening, and was coping with the emotional strain of his marital and financial difficulties. (R1-33-25, 34-35, and Exhibit "3" to Petitioner's Deposition).

Several deputies were conversing about service pins that had been given to deputies at the Christmas party, and a comment was made regarding the small writing on the pins. The Petitioner then stated that "(Sheriff) Gilbert had never been a cop and, therefore, shouldn't be a sheriff." (R1-33-20; R2-1-2).

Sgt. Griffith, who had been speaking with Deputy Berry about a case, turned to the Plaintiff and asked him what he meant. Easterday then replied "Look at all the mistakes he's made." When asked by Griffith to identify the mistakes, Plaintiff responded, "Just the mistakes." Griffith, who was upset over Easterday's remarks, then responded that the only mistake the Sheriff made "was

hiring Easterday's red-headed ass". (R1-33-20-22; R1-32-38-42, 48-49). During this exchange between Easterday and Sgt. Griffith, Deputy Garrett twice warned Easterday to be quiet because he could see that Griffith was angry with Easterday as a result of his comments, and he didn't want Easterday to get into trouble. (R1-32-32-33, 48-49, R1-33-21).

Griffith was not the only deputy offended by Easterday's statements. Easterday's personal attack on the Sheriff troubled Deputy Berry, who was upset with Easterday's criticism of the Respondent which he perceived to be disrespectful to the Sheriff's authority and his qualifications to run the Sheriff's Office. (R1-32-46, 47).

Following the confrontation with Sgt. Griffith, Easterday went home after his shift concluded. Upon learning that he had "stirred up a hornet's next" as a result of his statements during the shift change, he wrote a letter of apology to the Sheriff. (R1-33-23-25; Respondent's Exhibit "3" to Deposition of the Petitioner).

When Easterday met Sheriff Gilbert several days later, Gilbert informed the Petitioner that he could not have people talking behind his back and criticizing him in front of other deputies. The Sheriff told him that if he let Easterday get away with it, any officer or employee would be able to engage in the same conduct. The Sheriff then dismissed Easterday for his disrespectful remarks which violated an agency policy prohibiting deputies from criticizing or demeaning other members of the Sheriff's Office. (R2-1-2; R1-33-8-9; Exhibit "1" to Petitioner's Deposition; R1-33-27, 37: R1-32-27, 37, 44-45). Petitioner appealed his termination to a grievance committee, which

unanimously approved the Sheriff's decision to dismiss the Petitioner. (R2-1-8).

ARGUMENT

A. The Eleventh Circuit's Decision Does Not Conflict With *Sheppard v. Beerman* or Decisions of This Court

The asserted conflict upon which Petitioner grounds jurisdiction of this Court does not exist. When this Court reviews the District Court's order granting Respondent's motion for summary judgement and the record in this case, it will be obvious that the Eleventh Circuit's affirmance creates no conflict with the decision of the Second Circuit in *Sheppard v. Beerman*, 94 F.3d 823 (2d Cir. 1996). Rather, the district court's order, affirmed by the Eleventh Circuit, expressly relies on opinions of this Court which have addressed similar First Amendment issues.

It is well settled by this Court that public employee's right to speak on matters of public concern is not absolute. An employer may discipline an employee if the speech has the potential to disrupt the work environment. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). However, a governmental employer is not required to wait for events to deteriorate to the point of actual disruption or destruction of close working relationships before taking action against an employee. *Connick v. Myers*, 461 U.S. 138, 152 (1983).

Both the Second Circuit and the Eleventh Circuit have embraced these concepts. Both courts have recognized that an employee's speech may be restricted when it carries a real potential to disrupt the operations of the agency. In *Sheppard*, the court held that "a government official may, in certain circumstances, fire an employee for speaking – even on a matter of public concern – where the speech has the potential to disrupt the work environment." 94 F.3d at 827, *citing Rankin*, 483 U.S. at 384. The Eleventh Circuit, following *Connick v. Myers*, reached the same conclusion in *McCabe v. Sharrett*, 12 F.3d 1558, 1573 (11th Cir. 1994).

Petitioner's efforts to create a conflict hinge on *Sheppard*'s caveat that the employer's action against the employee must be based on the perceived disruption and not in retaliation for the speech. According to the Petitioner, conflict exists because the Eleventh Circuit, by affirming the summary judgment in this case, condones such retaliation. Such an argument ignores decisions of this Court, the First Amendment analysis of the District Court, and the record in this case.

In a case involving First Amendment issues, the first inquiry is to determine whether the speech at issue addresses a matter of public concern. *Rankin*, 483 U.S. at 384. If the speech involves a matter of public concern, the court then applies the balancing test set forth in *Pickering v. Board of Public Education*, 391 U.S. 563, 568 (1968), weighing the employee's First Amendment interests against "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."

In balancing the respective interests of the parties, several factors should be considered including: (1) whether the speech impedes the employer's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made. *Connick*, 461 U.S. at 151-155. In determining whether the speech impeded the duties, the court may examine whether the statement impairs discipline by supervisors or harmony among co-workers, or has a detrimental impact on close working relationships. *Rankin*, 483 U.S. at 388.

The District Court followed *Rankin*, *Connick* and *Pickering* in its discussion of the case, concluding first that Easterday's comments constituted a matter of public concern and then applying the balancing test to the competing interests of the Petitioner and the Respondent. (Appendix B, 6a-12a). In granting the motion for summary judgment, the District Court determined that Respondent's interest in maintaining the efficient functioning of his office outweighed Petitioner's interest in making the on-duty comments at issue. (App. A, 10a). The court found Easterday's comments not only had the potential for disruption, but that disruption to the morale, harmony, and discipline of the deputies actually occurred. (App. A, 9a, "In this case, Easterday's comments instantly caused friction with his co-workers. . . . ") Because of the insubordinate nature of Petitioner's speech and its disruptive effect to the close working relationship of the deputies, the District Court correctly determined that Easterday's First Amendment rights were not offended. *See, Connick*, 461 U.S. at 154, 155.

Moreover, the record amply supports the court's findings. Easterday's insubordinate remarks, which were critical of Sheriff Gilbert's qualifications, infuriated his immediate supervisor, Sgt. Dale Griffith. (R1-32-37, 42; R1-33-21). Deputy Ralph Garrett, upon observing Griffith's apparent anger, twice warned Easterday to "shut up". (R1-32-37; R1-33-21).

Another deputy present at the time, Hank Berry, was also upset with Easterday's criticism of the Sheriff. Deputy Berry considered Easterday's conduct to be disrespectful to the Sheriff and a challenge to his authority and qualifications to lead the Sheriff's Office. Berry was upset because deputies are considered to be an extension of the Sheriff and it troubled Berry that Easterday was openly critical of the Respondent while on duty and in the presence of other officers. (R1-32-46-47).

When the Petitioner met with the Respondent following the incident, Sheriff Gilbert cited Easterday's insubordination as the reason for his dismissal. Gilbert was equally concerned that discipline would be adversely affected if he failed to act decisively. (R1-32-44; R1-33-25-27).

Thus, the evidence of disruption and potential disruption is hardly "weak and speculative" as asserted by the Petitioner. The District Court's decision, affirmed by the Eleventh Circuit, does not conflict with *Sheppard* in view of the District Court's analysis and the record below. The *Pickering* analysis of the District Court, which was affirmed by the Eleventh Circuit is consistent with decisions of this Court and other federal courts, including the Second Circuit.

B. The Eleventh Circuit's Affirmance of the Summary Judgment Does Not Depart From the Accepted and Usual Course of Judicial Proceedings

The Petitioner argues unsuccessfully that the District Court's *Pickering* analysis is flawed. Missing from Petitioner's *Pickering* argument is any deference to the Respondent's legitimate interest in maintaining morale and discipline within his agency.[2]

Petitioner, however, glosses over these issues. Rather, Petitioner argues that because the balancing test has been applied in favor of the employee in cases decided by other circuit courts of appeal, no "meaningful" analysis occurred in the present case. (Petitioner's Brief, p. 10). In the Eleventh Circuit, the Petitioner asserts, law enforcement officers "have watered down First Amendment rights". (*Id.* at 19).

This specious argument necessarily fails because each of the cases relied upon by Petitioner may be readily distinguished by the facts. None of the cases cited by Petitioner favorably compares to the instant case when the speech at issue is considered.

In *Wulf v. City of Wichita*, for example, a city police officer was terminated after he wrote a letter to the Attorney General requesting an investigation of certain activities and incidents in the police department. The court

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[2] However, several of the cases relied upon by Petitioner, including *Wulf v. City of Wichita*, 883 F.2d 842, 860-62 (10th Cir. 1989) and *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996) recognize these concerns.

found no evidence that the letter adversely affected discipline or the close working relationships among the officers. 883 F.2d at 861. Furthermore, any controversy or disruption which may have existed could not be attributed solely to the letter; there was significant discussion among the officers about the issues raised in the letter before it was written. *Id.* For these reasons, the court resolved the *Pickering* balancing test in favor of the plaintiff. *Id.* at 682.

Similarly, the court in *Gardetto v. Mason* found no evidence of actual disruption as a result of the speech in question. In *Gardetto,* a teacher alleged that her First Amendment rights were violated when she was suspended, demoted and then dismissed by the college president after speaking in support of candidates for the college's board of trustees. In balancing the interests of the parties, the Tenth Circuit emphasized that at trial, the college president testified that he did not suspend or demote the plaintiff because of any actual or perceived worry about disruption caused by her speech. 100 F.3d at 816. In applying the *Pickering* analysis to these facts, the court held that teacher's speech was protected by the First Amendment. *Id.*

Cromer v. Brown, 88 F.3d 1315 (4th Cir. 1996) follows suit in view of its particular facts. The plaintiff, a deputy sheriff, alleged that he was fired by the sheriff because he joined a black officers' association and complained about perceived racial discrimination in the sheriff's office. The Fourth Circuit, applying *Pickering,* found against the sheriff when considering the impact to discipline, morale, and good working relationships. Specifically, the court found that the speech was not insubordinate or rebellious in

tone; morale was low due to race relations and was not appreciably diminished by the speech; and there was an absence of a close working relationship between the sheriff and the plaintiff before the speech occurred. Thus, on the facts presented, the deputy prevailed. 88 F.3d at 1328, 1329.

The record in each of these cases, then, dictated the conclusion that the employee's speech did not impede the employer's ability to perform its duties sufficiently. In contrast, the District Court properly recognized the Respondent's substantial interest in developing discipline, esprit de corps and uniformity of purpose, and that the Petitioner's conduct adversely affected morale, harmony and discipline. (App. A, 10a; *see, Kelley v. Johnson*, 425 U.S. 238, 246 (1976).

Furthermore, none of the cases cited by the Petitioner involves on-duty speech which, in the presence of other employees, directly challenged the employer's leadership abilities. Unlike the cases cited by the Petitioner, Easterday's personal attack on the Sheriff amounted to insubordination. Statements critical of the head of a paramilitary group carry with them the real potential for damaging cohesion and morale. *Rogers v. Miller*, 57 F.3d 986, 992 (11th Cir. 1995); *Busby v. City of Orlando*, 931 F.2d 764, 774 (11th Cir. 1991). The context of Easterday's insubordinate comments, as well as the time (on-duty), place (job-site), and manner (in uniform and in the presence of co-workers) distinguish the instant case from the others cited by the Petitioner.

Finally, it is remarkable that the Petitioner can conclude from a single decision that law enforcement officers' First Amendment rights have been eroded by the Eleventh Circuit. Petitioner should revisit *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982) and *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992), in which the court found officers' speech to be protected under the First Amendment. Both cases, however, stand in marked contrast to the instant case because of the facts presented to the court.

In *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982), a police captain, while *off duty* at a cocktail lounge, referred to the chief as a "bastard" and a "son of a bitch". Holding that the captain's demotion and transfer were unconstitutional the court held:

> It must be remembered that we are talking about off-duty shop talk, which, although regrettably indiscreet and tactless, is nonetheless basically idle bar room chatter. Such conversation generally is not subject to sanction. *Id.* at 838.

Also, in *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992), the court found that off-duty campaign activities by the plaintiff for the sheriff's opponent were protected by the First Amendment. The speech in question was not rude or insulting to the sheriff and there was no evidence that the plaintiff's comments disturbed the harmony of his co-workers or detrimentally impacted the close working relationship of his fellow deputies. *Id.* at 1528; *see, Rogers v. Miller*, 57 F.3d at 991.

It is untenable, therefore, for the Petitioner to argue that the Eleventh Circuit has diminished the First

Amendment rights of law enforcement officers in this circuit. It should be obvious that each case rests on its own merits, and that the Eleventh Circuit properly decided the instant case in favor of the Respondent because of the disruption or potential disruption evident from Petitioner's speech.

In view of the record in this case, and the District Court's First Amendment analysis, it is equally untenable to advocate that *Pickering* has been misapplied. The Eleventh Circuit's decision to affirm the summary judgment follows closely opinions of this Court, including *Connick v. Myers*.

The Petitioner's on-duty insubordinate remarks in this case disrupted the close working relationships of the deputies. If the Respondent failed to act decisively, Petitioner's speech would have damaged morale and adversely affected Respondent's effectiveness as head of the agency. The District Court, based on this record, properly determined that Respondent's interest in maintaining the efficient operation of his office outweighed the Petitioner's interest in making on-duty statements which were critical of the Sheriff.

CONCLUSION

The Eleventh Circuit's affirmance of the District Court's Order, therefore, does not conflict with *Sheppard v. Beerman*, or otherwise depart from the First Amendment jurisprudence of this Court and other federal courts. The Petition for Writ of Certiorari should be denied.

Respectfully submitted this 10th day of March, 1997.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PAUL EASTERDAY, Plaintiff, v. LARRY GILBERT, individually and in his official capacity as sheriff of Okaloosa County, Florida, Defendant.	)	CIVIL ACTION NO. 93-30628/LAC

ORDER

(Filed Apr. 18, 1996)

This is a civil rights action pursuant to 42 U.S.C. § 1983. Defendant moves for summary judgment arguing no genuine issues of material fact exist and he is entitled to judgment as a matter of law. (doc. 31). For the reasons below, the motion is granted.

I. Background

Plaintiff Paul Easterday is a former Deputy Sheriff for Okaloosa County, Florida. On December 23, 1991, he made several critical remarks about Okaloosa County's elected Sheriff, Larry Gilbert, during a morning shift change. While in uniform and in the presence of four other deputies, Easterday commented that Gilbert, who was up for re-election at the time, "had never been a cop and, therefore, shouldn't be a sheriff."

Sergeant Dale Griffith overheard the comment and asked Easterday what he meant by it. Easterday responded, "Just look at all the mistakes he has made." Griffith asked Easterday to identify the mistakes, and Easterday answered, "Just all his mistakes." Griffith then became angry and responded that the only mistake Sheriff Gilbert had made was hiring Easterday.

Eight days later, Sheriff Gilbert discharged Easterday, explaining he could not have people criticizing him behind his back in front of other deputies. In 1993 Easterday filed this action alleging he was discharged for exercising his First Amendment right to freedom of speech. This motion for summary judgment followed.

II. Discussion

Pursuant to Federal Rule of Civil Procedure 56, Sheriff Gilbert urges the Court to enter summary judgment in his favor. In support, he argues Easterday cannot maintain a section 1983 action because his on-the-job remarks were not protected by the First Amendment. At the outset, the Court notes motions for summary judgment can be granted only when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir. 1987). An issue of fact is "genuine" if the record as a whole could lead a rational trier of fact to find for the nonmoving party. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "material" if it might affect the outcome of the case under the governing law. *Id.* In ruling on a motion for summary judgment, the Court must take the evidence in a light most favorable to the nonmoving party. *Griesel v. Hamlin*, 963 F.2d 338, 341 (11th Cir. 1992). With this standard in mind, the Court agrees judgment should be entered for Sheriff Gilbert.

A public employee's right to freedom of speech is not absolute. *See Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989). Rather, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Under certain circumstances, therefore, a government employer may lawfully discharge an employee for making public remarks or comments.

To determine whether a given discharge is lawful, the Court must make two inquiries. First, the Court must determine whether the speech at issue constitutes a "matter of public concern." *Bryson*, 888 F.2d at 1565 (quoting *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)). Assuming it does, the Court must then conduct a balancing test, weighing the employee's interest as a citizen in commenting upon matters of public concern against the state's interest as an employer in promoting efficiency in the delivery of public services. *Id.* (quoting *Pickering*, 391 U.S. at 568). If the state's interest outweighs that of the employee, no First Amendment

violation has occurred. Both inquiries are matters of law to be decided by the Court. *Id.* at 1566 n. 2.

A. "Matter of Public Concern"

Initially, the Court finds Easterday's comments constitute a "matter of public concern." The statements suggested Gilbert was unfit or unqualified to hold the office of Sheriff. Speech directed to public issues or candidates running for public office "invariably address[es] matters of public concern because it is 'the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Stough v. Gallagher*, 967 F.2d 1523, 1527 (11th Cir. 1992) (internal citations omitted).

B. *Pickering* Balancing Test

Accordingly, the Court must balance Easterday's interest in making these remarks against Sheriff Gilbert's interest in maintaining the efficient operation of his office. *See Pickering*, 391 U.S. at 568. Three criteria are relevant to this inquiry: (1) whether the speech at issue impeded the government's ability to perform its duties efficiently, (2) the time, place and manner of the speech, and (3) the context in which the speech was made. *Bryson*, 888 F.2d at 1567. For the reasons below, the Court finds this balance favors Sheriff Gilbert.

1. Impediment to Government Functions

An employee's speech impedes government functions if it "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* at 1562 (quoting *Rankin*, 483 U.S. at 388).

In this case, Easterday's comments instantly caused friction with his co-workers. Upon hearing the remarks, Sergeant Griffith became angry, challenged Easterday to explain himself, and then personally insulted him.[1] During the exchange, Deputy Ralph Garrett noticed Sergeant Griffith was becoming so angry that he twice warned Easterday to "shut up." Similarly, the comments upset Deputy Hank Berry, who submitted an affidavit stating, "deputies are an extension of the [S]heriff, and it troubled me that Easterday was openly critical of the Sheriff while on duty and in the presence of other officers such as myself."

Moreover, Easterday's comments posed several potential impediments to the functioning of the Sheriff's office. According to Sheriff Gilbert's affidavit, morale and discipline are essential to the proper functioning of his office. When the Sheriff gives an order, deputies must respond positively and quickly. By criticizing his ability in front of other on-duty officers, Easterday challenged

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[1] Griffith reportedly said the only mistake Sheriff Gilbert had made was hiring Easterday's "red-headed ass."

Gilbert's leadership ability. Had the Sheriff not acted decisively in disciplining Easterday, dissention might have grown, thereby affected other officers' willingness to respond to the Sheriff's orders.

Deputy Ralph Garrett agreed: "Negative statements towards the Sheriff or other law enforcement officers may cause a problem to agency morale. . . . Failure to discipline a deputy for making disrespectful remarks, such as those made by Deputy Easterday, could open the door to other deputies challenging the Sheriff's ability to lead the agency." Likewise, Sergeant Griffith stated:

> Criticizing fellow workers and supervisors, including the Sheriff, in the presence of other officers is detrimental to maintaining the harmony and morale of the officers, which is so important to a law enforcement agency. . . . Deputy Easterday's comments, if not addressed, could have brought unrest, lack of discipline, and disrupted the harmony among the deputies, which would detract the agency from performing its mission of promoting the safety of persons and property throughout Okaloosa County.

The Eleventh Circuit recognizes the special concerns of maintaining discipline in police departments. "Order and morale are critical to successful police work: a police department is 'a paramilitary organization, with a need to secure discipline, mutual respect, trust and particular efficiency among the ranks due to its status as a quasi-military entity different from other public employers.' " *Hansen v. Soldenwagner*, 19 F.3d 573, 577 (11th Cir. 1994) (internal citations omitted); *see also Connick v. Meyers*, 461 U.S. 138, 151-52, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)

("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.").

Easterday argues in response that summary judgment should not be granted because a genuine issue remains whether his comments, in fact, impeded or disrupted the functioning of the Sheriff's office. In support, he submits the affidavit of Greg Tyson, an officer present when the comments were made. Tyson maintains Easterday's remarks had no effect whatsoever on his own job performance.

The Court finds Tyson's affidavit insufficient to defeat summary judgment for two reasons. First, the evidence shows Easterday's comments upset Sergeant Griffith and Deputy Berry regardless of their effect on Deputy Tyson. In this Court's view, a comment need not upset every officer on the force before it can be considered disruptive.

Secondly, at any rate, Sheriff Gilbert need not prove Easterday's comments *actually* caused any disruption in the office. As recognized by the Supreme Court, a government employer need not wait for events to deteriorate to the point of actual disruption or destruction of working relationships before taking action against an employee. *See Connick*, 461 U.S. at 152. Gilbert need only demonstrate the potential for disruption based on all the facts and circumstances. The facts here reach the necessary level.

2. Time, Place and Manner

The fact Easterday's statement impeded, and might have further impeded, the efficient functioning of the Sheriff's office is even more evidence upon examining the second factor: the time, place, and manner in which the speech was delivered. Easterday made the critical statements to his fellow deputies just prior to a shift meeting, while on duty and in uniform. *See Bryson*, 888 F.2d at 1567 (speech unprotected when employee "chose to spend police department time broadcasting his rancor"). Such comments are far different than the off-duty, out-of-uniform remarks found protected in *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982).

3. Context

The third factor – context – also weighs in Sheriff Gilbert's favor. Easterday's statements effectively challenged Gilbert's ability to lead the Sheriff's Office. For reasons already discussed, Gilbert had a powerful motive to deal with such remarks decisively.

In sum, the Court has applied the *Pickering* balancing test and finds Sheriff Gilbert's interest in maintaining the efficient functioning of his office outweighs Easterday's interest in making the on-the-job remarks at issue. Easterday's speech therefore was not protected by the First Amendment, and he cannot maintain a section 1983 action based on his discharge.

III. Conclusion

Accordingly, it is hereby **ORDERED:**

1. Defendant's motion for summary judgment (doc. 31) is **GRANTED.**

2. The Clerk shall enter judgment against Plaintiff in favor of Defendant.

ORDERED on this 18th day of April, 1996.

/s/ Lacey A. Collier
Lacey A. Collier
U.S. District Judge

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-2648
Non-Argument Calendar

D. C. Docket No. 93-30628-LAC

PAUL EASTERDAY,

Plaintiff-Appellant,

versus

LARRY GILBERT; SHERIFF, OKALOOSA COUNTY, FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(Filed November 5, 1996)

Before BLACK, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

Upon a de novo review of the record in this case, we affirm the summary judgment entered in favor of Defendant-Appellee for the reasons set forth in the district court's order of April 18, 1996.

AFFIRMED.